

# In the Supreme Court of the United States

OCTOBER TERM, 1948

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No. 845

GERHART EISLER, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## MEMORANDUM SUGGESTING DENIAL OF THE PETITION FOR A WRIT OF CERTIORARI

The Solicitor General submits this memorandum in order to suggest the propriety of denying the petition in this case because of the petitioner's flight from justice.

On May 6, 1949, after the Court of Appeals had affirmed his conviction and before the filing of the instant petition, the petitioner fled the United States. Efforts to secure his extradition from Great Britain were unsuccessful, and he is now in the Soviet Zone of Occupied Germany. (Pet. 20.) The petitioner has given no indication, in his petition or otherwise, that he intends voluntarily to return to the jurisdiction of the United States.

Review on writ of certiorari is not a matter of right, but of sound judicial discretion. Revised Rules of the Supreme Court of the United States, Rule 38 (5). An individual who has deliberately placed himself beyond the jurisdiction of this Court should not be heard to invoke its discretion to review his conviction. In *Smith v. United States*, 94 U. S. 97, Chief Justice Waite, speaking for a unanimous Court, said:

It is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render. In this case it is admitted that the plaintiff in error has escaped, and is not within the control of the court below, either actually, by being in custody, or constructively, by being out on bail. If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances we are not inclined to hear and decide what may prove to be only a moot case.

These observations are as applicable to the circumstances now before the Court as to the case in which they were uttered. Compare also *Bonahan v. Nebraska*, 125 U. S. 692; *Allen v. Georgia*, 166 U. S. 138; *People v. Genet*, 59 N. Y. 80; *State v. Spry*, 126 W. Va. 783. See American Law

Institute, Code of Criminal Procedure, Official Draft (1939) § 442 and Commentary, p. 1236.

The Government therefore submits that the petition should be denied because the petitioner has fled the jurisdiction of the Court. If, however, the Court should believe that these circumstances are not in themselves a sufficient reason for denying the writ, the Government requests additional time, after action on this suggestion, within which to present its other reasons for opposing the grant of a writ of certiorari in this case.

Respectfully submitted.

PHILIP B. PERLMAN,  
*Solicitor General.*

JUNE 1949.